Supreme Court, U.S.
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No. 90-1148

In The

Supreme Court of the United States

October Term, 1990

ROY RODGERS, as Sheriff of Gilchrist County, Florida,

Petitioner,

vs.

MARCIA J. HUFFORD, ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS IN THE COURT BELOW

Respondents' filed a Complaint on October 23, 1985 asserting federal and state law claims. (R1-1) Defendants filed a Motion to Dismiss on December 5, 1985 (R1-5) which was denied by Order dated January 10, 1986. (R1-9)

Defendants filed their Answer and Affirmative Defenses on January 27, 1986. (R1-10) On August 13, 1986 Defendants filed a Motion for Summary Judgment which was denied by Order dated February 24, 1987. (R1-34)

During the pendency of this action Defendant Deputy Thomas Holt died. On April 21, 1987 a Suggestion of Death was filed on the record. (R1-39) Defendant Holt's estate was substituted as a party Defendant and an Answer filed on May 17, 1988. (R1-51)

Following discovery, the case came to trial before a jury in Gainesville, Florida beginning on October 31, 1988. On November 2, 1988, the jury returned a verdict in favor of Plaintiffs against Sheriff Rodgers. (R2-76) A Judgment on the verdict was entered November 4, 1988. (R2-77) Defense Motions for Judgment in accordance with their Motion for Directed Verdict or, in the alternative, for a new trial, were filed on November 14, 1988 (R2-79) and denied by Order dated November 29, 1988. (R2-82) This appeal followed. After oral arguments on March 29, 1990 the Eleventh Circuit filed an Opinion on September 25, 1990 affirming the District Court. (App. 3-11) Defendants' Petition for Rehearing and Suggestion of Rehearing en banc, were denied on December 12, 1990. (App. 13)

B. STATEMENT OF THE FACTS

Marcia Hufford and Dennis Lee Penticoff were divorced in Leon County, Florida on April 22, 1980. (R1-1) Marcia Penticoff Hufford was living in Clearwater, Florida at that time. (R-4-95-52, Trial Transcripts Vol. I) Marcia Hufford was awarded custody of their only child, Joshua James Penticoff, during the school year. (R1-1, R4-95-53, Trial Transcripts Vol. II)

Dennis Penticoff ceased contact with Joshua in June 1980. (R4-95-4, Trial Transcripts Vol. I) The Huffords and Joshua moved to Trenton, Florida in October 1980, leaving forwarding information in Clearwater. (R4-95-5, 6, 42, Trial Transcripts Vol. II)

On October 23, 1981 Dennis Lee Penticoff presented the Gilchrist County Sheriff's Department with a photocopy of his final judgment of divorce and an affidavit. (R4-95-14, 52, Trial Transcripts Vol. II) Contrary to Petitioner's statement, the affidavit bore no indicia of having been filed in any court proceeding. (R4-95-14, Trial Transcripts Vol. II) Deputies Holt and Dubois went to the Hufford's home at 11:30 p.m. that Sunday evening and without notice, permission, or consent, entered the house and demanded that the Huffords' turn over three year old Joshua (R3-94-33, 60, 61, 62, 63, 64, R4-95-11, Trial Transcripts Vols. II and III).

Marcia Hufford told the deputies that there was no Court order; that she had legal custody of Joshua and asked them to contact the Sheriff to straighten the matter out. (R4-95-11-12, Trial Transcripts Vol. II) Deputy Dubois told Marcia Hufford that the sheriff "knew all about this." (R4-95-12, Trial Transcripts Vol. II) Deputy Holt did not

contradict this statement and told Richard Hufford that they were following Sheriff Rodger's orders. (R3-94-35, 36, Trial Transcripts Vol. I).

The Huffords testified that they were threatened with jail by the deputies and that both of the officers brandished their flashlights in a threatening manner. (R3-94-34; R4-95-50, Trial Transcripts Vols. II and III) Deputy Holt could not recall any threats or conversation for that matter. (R3-94-60, 61, 62, 63, 64, 65, Trial Transcripts Vol. I)

Approximately eight weeks after the incident, Deputy Holt apologized to Mrs. Hufford for the incident; advised her that he knew what they were doing was wrong; and that if it had been left up to him, the incident would have never occurred. (R3-94-21, Trial Transcripts Vol. I)

Consistent with his apology, Deputy Holt later testified that he had been specifically trained and instructed to follow a superior's orders, even where it required him to knowingly perform an unlawful or illegal act. (R3-94-58, 59, Trial Transcripts Vol. I).

After obtaining Joshua from the deputies, Dennis Penticoff stayed in Clearwater, Florida for six weeks and then fled to Texas. (R4-95-24, Trial Transcripts Vol. II) After fifteen months, Marcia Hufford located Joshua in Texas in late January, 1983. The Florida Court granted sole and exclusive custody of Joshua Penticoff to Marcia Hufford, subject to limited visitation with Dennis Penticoff. Contrary to Petitioner's assertions, no Court Order was entered reflecting any agreement of the parties. (In Re: *Penticoff v. Penticoff*, Now Case No.: 88-36-CA,

Eighth Judicial Circuit, in and for Gilchrist County, Florida)

SUMMARY OF ARGUMENT

In Florida, county sheriffs are officials of the counties they serve and are thus "persons" not entitled to Eleventh Amendment Immunity. The Eleventh Circuit analyzed the role of sheriffs in Florida, including the crucial factor of state liability for monetary awards and correctly concluded, in conformity with this Court's rulings, that sheriffs are arms of the counties.

This Court should not consider Petitioner's second question presented. Sheriff Rodgers did not raise the issue of the jury verdict form on appeal, nor is there a clear objection in the record. The question submitted to the jury conforms to the "deliberate choice" standard formally adopted by this Court. Substantial evidence supported the jury's determination that Sheriff Rodgers instigated and maintained the policies and procedures for his deputies which directly led to the violation of Respondents' civil rights.

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT CORRECTLY DECIDED THAT COUNTY SHERIFFS ARE COUNTY OFFICIALS AND THUS "PERSONS" FOR PURPOSES OF 42 U.S.C. §1983 ACTIONS, AND THAT ELEVENTH AMENDMENT IMMUNITY IS IRRELEVANT IN THIS CASE.

This Court has long ruled that Eleventh Amendment Immunity does not extend to counties or municipal

corporations. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). The criteria of determining whether an entity is a "state agency" or a county or municipal corporation is equally well established. The focus of the inquiry is whether a judgment would have to be paid from public funds of the state treasury. *Edelman v. Jordan*, 415 U.S. 651 (1974), 94 S.Ct. 1347, 39 L.Ed. 2d 662. Four other factors that bear on this determination are how state law applies to the entity; what control the state maintains over the entity; where funds from the entity are derived; and how the entity is treated by state courts. See *Fouche v. Jekyll Island-State Park Authority*, 713 F.2d 1518 (11th Cir. 1983); *Fincher v. State of Florida Department of Labor*, 798 F.2d 1371 (11th Cir. 1986); *Tuveson v. Florida Governor's Council on Indian Affairs, Inc.*, 734 F.2d 730 (11th Cir. 1984).

After analyzing the role of county sheriffs in Florida under this factually intensive criteria, the panel decision correctly held that in Florida, county sheriffs are county officials and not officers of the State. Thus, county sheriffs are not entitled to Eleventh Amendment Immunity. This decision is totally consistent with the prior decisions of the Eleventh Circuit and Fifth Circuit Courts of Appeal. *Lundgren v. McDaniel*, 814 F. 2d 600 (11th Cir. 1987); *Lucas v. O'Loughlin*, 831 F.2d 232 (11th Cir. 1987); *Barts v. Joyner*, 865 F.2d 1187 (11th Cir. 1989); *Tanner v. McCall*, 625 F.2d 1183 (5th Cir. 1980).

Similarly, this decision is also consistent with Florida State Court rulings that counties are not entitled to Eleventh Amendment Immunity, *Elder v. Highlands County Board of County Commissioners*, 497 So.2d 1334 (Fla.

2nd D.C.A. 1986) and that sheriffs are county officials. *Beard v. Hambrick*, 396 So.2d 708 (Fla. 1981)

It is critical to note that the Petitioner does not contend that any portion of this award is likely to be paid by state revenues. Neither the State of Florida, nor any of its agencies is responsible for the debts of county sheriffs. Section 30.49, 30.50 *Florida Statutes*. In Florida, all judgments are paid by the county commission with county revenues if there is no insurance. In this particular case, the claim will be paid by a self-insurance fund and insurance purchased by county revenues.

In determining that county sheriffs are the type of local governmental entities contemplated in *Monell v. N.Y. City Dept. of Social Services*, 436 U.S. 658, 663, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), the Eleventh Circuit naturally analyzed the Constitution and Statutes of Florida, the control of county sheriffs by the state government and the fiscal responsibility of the state to satisfy judgments.

Florida State Law sets forth the general duties of all county officials including county commissions, county school boards and county sheriffs. (Florida Statutes Chapters 125, 230, and 30 respectively). The salaries of county officials including sheriffs, county commissioners, and county clerks are set forth in Florida Statutes Chapter 145.

Likewise, the inclusion of sheriffs under *local government*, "County Officers", in the Florida Constitution is no random designation as Petitioner would suggest.[1] The

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[1] See, *Madison v. Gerstein*, 440 F.2d 338 (5th Cir. 1971). A Florida "Sheriff" is a department head within the executive arm of the local government. *Id.* at p. 342

electors of a county may abolish the office of sheriff (along with other county offices) by referendum. Florida Constitution, Article VIII, §1(d), Section 30.53, Florida Statutes guarantees the autonomy of county sheriffs:

> **30.53 Independence of constitutional officials. – The independence of the sheriffs shall be preserved concerning the purchase of supplies and equipment, selection of personnel, and the hiring, firing, and setting of salaries of such personnel; provided that nothing herein contained shall restrict the establishment or operation of any civil service system or civil board created pursuant to s. 14, Art. III, of the Constitution of Florida, provided further that nothing contained in ss. 30.48-30.53 shall be construed to alter, modify or change in any manner any civil service system or board, state or local, now in existence or hereafter established.**

Florida state courts have also consistently ruled that county sheriffs are "county officials". As stated by the Florida State Supreme Court:

> "We find that a sheriff is a "county official", and as such is an integral part of the "county" as a "political subdivision" . . . " *Beard v. Hambrick*, 396 So.2d 708 (Fla. 1981)

In reaching its decision, the Florida Supreme Court stated, "The provisions of the Florida Constitution appear to clearly mandate this answer." *Id.* at p. 711. The Court then went on to state, "In our opinion, there is no reasonable way to construe Article VIII, Section 1, other than to include sheriffs as well as other named county officials as part of a county. . . . " *Id.* at p. 711.[2]

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[2] Even at common law prior to adoption of the 1968 Constitution, county sheriffs were not state officials. State officials

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Far from creating a question as to the status of Florida sheriffs, the panel decision removed any doubt for future litigants. Prior to the panel's decision, the District Courts in Florida had briefly split on this issue. The cause of the inconsistencies within the lower courts was an overbroad interpretation of the Eleventh Circuit's ruling in *Gamble v. Florida Dept. of Health and Rehabilitative Services*, 779 F. 2d 1509 (11th Cir. 1986) and its application in *Hill v. Department of Corrections*, 513 So.2d 129 (S. Ct. Fla. 1987). The lower Courts' confusion after *Gamble* has now been remedied by this Court's ruling in *Howlett v. Rose*, ___ U.S. ___, 110 S.Ct. 2430, ___ L.Ed. 2d___ (1990).

Petitioner's reliance upon Alabama and South Carolina cases is equally misplaced. In the Alabama and South Carolina cases, the Eleventh Circuit utilized the exact same factual analysis to correctly conclude that sheriffs were "state officials" for Eleventh Amendment Immunity purposes. This difference in results is because in Alabama and South Carolina any judgments are paid out of state treasury funds and because their sheriffs are state officers under their respective state constitutions.

The governing criteria of financial responsibility on the part of the state separates Florida sheriffs from Alabama sheriffs. The Eleventh Circuit concluded in *Parker v. Williams, supra*, "If we could say with a "virtual certainty" that the damages would be paid from county and not

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enjoyed sovereign immunity at common law while sheriffs did not. *Swenson v. Cahoon*, 152 So. 203 (Fla.S.Ct. 1933).

from state funds, our holding might be different," at 767 N. 2.

In the instant case, it is *certain* that the judgment against Sheriff Rodgers will *not* be paid with one penny of state funds. Sheriff Rodgers is part of a self insurance program for county sheriffs paid by county funds and carries excess liability insurance paid for with county monies.

The Eleventh Circuit in *Parker v. Williams*, 855 F. 2d 763, 766-767 N. 2 (11th Cir. 1988) and *Free v. Granger*, 887 So. 2d 1552 (11th Cir. 1989), both Alabama cases, relied upon the definition of sheriffs as state officers set forth in the Alabama Constitution. This crucial distinction between Alabama and Florida is not a question of semantics, but is one of the specific criteria that a Court is required to consider. While sheriffs are constitutional *state officials* in Alabama and South Carolina, county sheriffs are *county officials* under the Florida and Georgia State Constitutions. Georgia Constitution, Article IX, §1 #3.

County sheriffs in Florida are county officials under all criteria previously articulated by this Court. For this Court to now conclude otherwise would be to effectively extend Eleventh Amendment Immunity to all county officials and even municipalities.

II. PETITIONER HAS WAIVED ANY OBJECTIONS TO THE VERDICT FORM USED IN THE TRIAL COURT.

The Eleventh Circuit found that substantial evidence supported the jury's verdict that Sheriff Rodgers improperly trained (and/or supervised) his deputies. Petitioner

now seeks to object to the verdict form submitted at trial when he did not raise this issue on appeal before the Eleventh Circuit. Respondents submit that Petitioner has now waived his objection as to the propriety of the verdict form.

The record is ambiguous as to Petitioner's actual position on this issue at trial. At one point, counsel for Petitioner objected to the verdict form, but later reached agreement with the form used. (R5-4-9, 15, Trial Transcripts, Vol. III.) On appeal to the Eleventh Circuit Petitioner addressed only the sufficiency of the evidence to support the jury's verdict.

III. A WRIT OF CERTIORARI IS NOT JUSTIFIED BY PETITIONER'S ARGUMENTS.

The Eleventh Circuit's decision was limited to the facts of the case at bar and has no precedential value on any substantive 42 U.S.C. §1983 issues. The Eleventh Circuit did not redefine the limits of governmental liability but affirmed the issue without detailed comment. The appropriate forum for a review of the panel's decision would be en banc consideration. Petitioner filed a Motion for Rehearing and Suggestion of Rehearing en banc which were both denied without a poll. (Appendix, page 13).

Petitioner is, in effect, requesting this Court to review for a second time the trial court below, even though the Eleventh Circuit's decision at bar presents no novel or important questions which warrant a writ of certiorari. To grant the Writ in this case would open the floodgates for countless other petitioners to request "super appellate"

consideration. Petitioner's dissatisfaction with the brevity of the Eleventh Circuit's opinion does not merit this Court's consideration.

IV. THE ELEVENTH CIRCUIT'S DECISION IS CONSISTENT WITH PRIOR HOLDINGS OF THIS COURT AND IS SUPPORTED BY THE EVIDENCE.

After *Monell*, it is clear that counties and county officials can be held liable under 42 U.S.C. §1983 where the execution of the government's policy or custom inflicts the injury. In the instant case, the jury had three (3) independent grounds or basis to answer "yes" to question 3 of the verdict form.

There was clear and convincing evidence that the lack of police training, lack of proper policies, and lack of written procedures in the Gilchrist County Sheriff Department was so obvious and the inadequacy so likely to result in a violation of constitutional rights, as to amount to a "deliberate choice" within the purview of *City of Oklahoma v. Tuttle*, 471 U.S. 808, 85 L.Ed. 2d 79, 105 S.Ct. 2427 (1985), and *City of Canton, Ohio v. Harris*, 489 U.S. ___, 103 L.Ed. 2d 412, 109 S.Ct. ___ (1989).[3]

The unrefuted expert testimony at trial was that Deputy Holt was not properly trained even though appropriate training was readily available; that the Petitioner did not have necessary written policies and procedures on

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[3] It should be noted that Judge Paul's jury instruction in 1988 virtually tracked the language used by this Court in *Canton* verbatim.

numerous matters which he should have; and that the policies of the Petitioner were not consistent with proper police procedures. (R3-94-120, 127-128, Trial Transcripts Vol. I) Defendant Thomas Holt testified as to the express policy of Sheriff Rodgers:

> Q. If he asks you to do an unlawful or illegal act would you refuse to obey that order of command?
>
> A. I was told to do what my supervisor told me to do and if there was something wrong with it, my sheriff would take care of it. (R3-94-59, Trial Transcripts Vol. I)

Rather than properly training and supervising his officers, the Petitioner established an official policy wherein his authority as sheriff surplanted obedience and respect for the law. His deputies were specifically trained and instructed to follow a supervisor's order even where it required them to knowingly perform an unlawful or illegal act. (R3-94-59)[4] At no time did Petitioner ever deny that this was his formal or official policy.

The verdict form objected to by Petitioner required the jury to find a causal link between the Sheriff's policy and the wrongful acts of his deputies. *City of Oklahoma v. Tuttle, supra* at 823. As a direct and proximate cause of Petitioner's official policies, the deputies illegally entered

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[4] Deputy Holt incredibly testified 5 years later that he followed proper procedures on the night of October 23, 1981. (R3-94-79, Trial Transcripts Vol. I) In finding that Deputy Holt acted in good faith, the trial jury concluded that this was in fact the Petitioner's official policy and that Deputy Holt was acting in accordance with that policy when he committed the improper acts complained of.

into Respondent's home; refused to leave when asked to do so; refused to examine the photocopy and affidavit, or contact others when advised that their actions were illegal; and illegally seized and took into custody a three-year-old child without lawful authority.

There was also substantial, competent evidence that Sheriff Rodgers had actual prior knowledge of his deputies actions and approved them in advance.[5]

CONCLUSION

Petitioner's request for a Writ of Certiorari should be denied. The Eleventh Circuit's decision was consistent with the criteria set forth by this Court to determine "state agency" for 42 U.S.C. §1983 purposes. The decision at bar logically follows prior Eleventh Circuit and Florida State Court rulings on the status of Florida sheriffs as county officials.

This Court should not consider the second question presented by Petitioner. The record is ambiguous as to Petitioner's objection in the trial court and the issue was not raised in the Eleventh Circuit. Furthermore, the verdict form used conforms to the controlling case law

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[5] Documentary evidence which could have corroborated Petitioner's prior involvement or knowledge of this matter was not available at trial as the official complaint file was conveniently lost by the Petitioner and the radio log was destroyed. (R3-94-69, 70, 91-92, 104-105, Trial Transcripts Vol. I)

handed down by this Court and substantial evidence supported the jury's decision. Petitioner has set forth no justification for the Writ.

Respectfully Submitted,

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